THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0596, State of New Hampshire v. Paul Moreau, the court on February 27, 2006, issued the following order:

Following a jury trial, the defendant, Paul Moreau, was convicted on two counts of felonious sexual assault. On appeal, he contends that the trial court erred in: (1) failing to dismiss the charges based upon an unreasonable delay in indicting him; (2) failing to grant a continuance of greater than a half day when a 2003 statement of the victim was not provided until the day of trial; (3) denying his motion to dismiss because the grand jury heard facts that were materially different from those contained in the 2003 statement; (4) admitting evidence of the victim's disclosures to others; and (5) failing to sequester the victim from pretrial hearings. We affirm.

To establish a due process violation under the State Constitution based upon delayed indictment, the defendant must initially show that actual prejudice resulted from the delay. State v. Knickerbocker, 152 N.H. 467, 470 (2005). The defendant argues that the loss of certain evidence prejudiced him. Although he first cites the loss of the Somersworth Police Department file, the record reflects that the file was forwarded to the County Attorney's Office. He also cites the victim's 1991 videotape statement; the record reflects that he was provided the videotape the week before trial. He cites a 1991 note from the victim to her mother; while there is testimony in the record that the victim wrote such a note, there is no evidence that it was ever provided to the police or that it contained exculpatory evidence. Similarly, the State had no record of receiving a 1991 statement from the victim's mother. While the defendant also cites a 2003 statement prepared by the victim, the record indicates that the State did not become aware of the statement until the day before trial when she produced it. Moreover, given the date of the statement, it does not support the defendant's claim of prejudice due to his delayed indictment. Although in a pretrial hearing the defendant stated that the victim's 2003 statement indicated that her competency might be an issue, his only argument in support was that the 2003 statement differed from her earlier report. See N.H. R. Ev. 601 (presumption of witness competency). To the extent that the defendant argues that the statement entitled him to a Hungerford hearing, see State v. Hungerford, 142 N.H. 110 (1997), he did not request such a hearing before the trial court. See State v. Blackmer, 149 N.H. 47, 48 (2003) (issues not raised before trial court not preserved for appellate review).

In support of his claim of prejudicial delay, the defendant also cites his inability to retain an expert to examine the plausibility of the presence of a snowmobile during the assaults. The record reflects that the defendant conceded that it was physically possible for a snowmobile to be stored in the location of the assaults and that he did not request an expert. See id. Although the defendant also argues that the loss of his employment records prejudiced him because it "would have been possible for [him] to have determined if he had been home on a Friday" during the period alleged, his claim that the loss of this evidence prejudiced him is speculative in light of the time frame alleged in the indictments. Based upon our review of the record, we find no error in the trial court's denial of the defendant's motion to dismiss based upon undue delay in indictment. See State v. Knickerbocker, 152 N.H. at 477 (defendant's failure to establish actual prejudice due to delayed indictment leads to same result under Federal Constitution).

While the defendant also argues that the trial court should have granted a longer continuance after the victim provided her 2003 statement, the record reflects that he did not object to the length of the continuance. Accordingly, we will not consider that issue. See Blackmer, 149 N.H. at 48.

The defendant next argues that the trial court erred in denying his motion to dismiss based upon the State's failure to present exculpatory evidence to the grand jury. We find no error in this ruling. The evidence cited by the defendant is the 2003 statement of the victim; the State reported that it did not become aware of the statement until after the grand jury proceedings. See also State v. Hall, 152 N.H. 374, 377 (2005) (State not obligated to present exculpatory evidence to grand jury).

The defendant next argues that the trial court erred in admitting evidence of the victim's disclosures of the assaults to her friend and to her mother. We are unpersuaded by the defendant's contention that the disclosures were not relevant. See N.H. R. Ev. 401 (evidence is relevant if it has any tendency to make existence of any fact that is of consequence to determination of action more or less probable that it would be without the evidence). We have not been provided with the defendant's motion in limine but we note that he did not object at trial to the testimony concerning such disclosures. Introduction of an earlier disclosure of a sexual assault may be admissible to reduce the risk that juries may equate a delay in reporting with fabrication; such admission is not conditioned upon the defendant first raising the issue of delay. See State v. Woodard, 146 N.H. 221, 226 (2001). The record reflects that testimony concerning the disclosures was brief, did not address the substance of the disclosures, see id., and did not create an undue tendency to induce a decision against the defendant on some improper basis, see State v. Sawtell, 152 N.H. 177, 181 (2005). Accordingly, we find no error in the trial court's ruling.

In his final claim of error, the defendant contends that the trial court should have sequestered the victim from pretrial hearings. He argues that her statutory right to be present at these hearings was limited to the extent that it was not inconsistent with his constitutional or statutory rights. The defendant has not cited any evidence that he raised this issue before the trial court; nor have we been able to find such evidence. We therefore decline to consider it on appeal. See Blackmer, 149 N.H. at 48.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox
Clerk